No. 3721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY (a corporation),
Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD. (a corporation) and ROBERT NETTLEFOLD,
Appellees.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

FIRST: AS TO THE "STATEMENT OF THE CASE" IN BRIEF FOR APPELLEES (pages 2-12).

1. On page 4 of the Brief respondent says:

> "On May 1, 1916, respondent wired Ford Motor Company at San Francisco that 5658 tons would be sent forward for shipment under this contract."

No reference is given to support this statement. Even if it were true, and the intention so expressed had been carried out, this would not be a

compliance with the contract; for the contract called for 6200 tons.

But we find nothing in the record to support the statement. On the contrary, respondent sent to libelant, on May 18, in answer to an urgent wire, the information that it would send 763 tons for Sydney, 1190 tons for Wellington, 2017 tons for other ports, and 116 tons of parts, making a total of 4086 tons, adding:

> "*This is complete Cacique cargo.*" (129)*

2. On the same page of the Brief counsel states:

> "which it was then thought would make up the complete tonnage required under this contract". (citing pages 280-283-284 of the Apostles)

The record clearly shows the contrary.

Respondent says, in a letter to its San Francisco agent, dated May 4, 1916:

> "We have intimated to you that *we cannot take the whole amount of the cargo on the Cacique.*" (280)

The San Francisco agent, in a letter to respondent, dated May 12, 1916, says:

> "We are still shy a cargo for this ship." (283)

In another letter of the same date, this agent informs respondent that it had contracted with Henry W. Peabody & Co. to supply cargo for 542 tons of its Cacique space, and adds:

* Figures in parentheses refer to pages in Apostles.

> "If you can supply the rest of the cargo making up the 6200 tons, there will be absolutely no loss on this contract." (284)

3. On pages 4-5 of the Brief respondent says:

> "When respondent discovered this shortage, and while the shipments were en route to San Francisco, respondent, on May 25, 1916, directed Traffic Manager Davis of the Ford Motor Company of San Francisco to borrow 1500 tons from shipments previously made to San Francisco for transport on the Union Steamship Company's steamers, * * * Efforts to borrow the 1500 tons failed on June 1st, which still left respondent short 1500 of the 6200 tons contracted for in the contract in suit."

The fact is that respondent admits that, in spite of its contract, it *"had not assumed that we were going to be held for 6200 tons space"* (286), and had,

> "made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of $35.00 per ton" (276).

thus

> "taking a considerable number of cars which otherwise would have had to go by Steamer Cacique." (316)

It is an indisputable fact that respondent yielded to the temptation of giving a part of the Cacique cargo to the cheaper carrier, thus making a considerable saving,—provided that it was not going to be held to its contract. Respondent did not "discover this shortage," (Brief p. 4) but *caused* it personally and deliberately, actuated by the double mo-

tive of self-interest and indifference to its contractual obligations.

4. On June 1st respondent wrote to libelant (among other things) that respondent

> "had effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the Coast originally contemplated to go forward by Union Steamships." (49; also Appellants' Brief, p. 5)

On the same day respondent received a wire from Union Steamship Company:

> *"We cannot give any of these cars to Grace Company."* (298)

The day before (May 31), respondent had received a wire from its agent:

> "Union Company say all cars at present here will leave Coolgardie June 1st., Waimarino or Floridian end of June. *Any cars here after July 1st they will give to Grace.*" (293, 294)

The following inferences may be fairly drawn from these facts:

a. If the letter sent by respondent to libelant was written *before* respondent had received the wire from Union Steamship Company, then the statement in the letter, above cited, was in fact *untrue.*

b. The letter sent by respondent to libelant was in all probability written *after* respondent had received the wire from its San Francisco agent, and in that case it shows that the cars which respondent offered to libelant in fulfillment of its contract were cars which would arrive in San Francisco *after July 1st.*

This makes clear respondent's statement in the same letter:

> "We wish it, therefore, definitely understood that if by reason of the above and other circumstances *our plans for supplying 6200 tons for this vessel do not carry through,* we do not consider our obligation binding." (49)

Part of these plans for supplying 6200 tons was to get from the Union Steamship Company 1500 tons *arriving in San Francisco after July 1st. If* they should so arrive, the contract would be binding; if not, then "we do not consider our obligation binding."

Respondent's correspondence discloses and demonstrates, therefore, first, the untruth of the statement "that it was respondent's understanding that the Steamer Cacique would leave on June 14th, and again that it would sail June 24th, and *that its plans had been made accordingly"* (Brief, p. 5); and, second, the "June loading" or "June sailing" sophistry which was adopted, as an afterthought, as a defence to respondent's breach of contract. The truth is that respondent's plans had, on June 1st, been built upon supplying part of its Cacique cargo, after July 1st, from this source.

5. *Respondent's letter of June 14th* (Brief p. 6) The Brief does not present a fair reflection of the effect of this letter. A reading of the letter (50, 51) will satisfy the court that it contains:

> (1) a flat repudiation of "any arrangements for 6200 tons", in other words, a flat repudiation of the contract;

(2) a statement that respondent *has* forwarded 4075 tons of cargo for the Cacique, and that it *will not* forward more.

(3) an offer to libelant to make a new contract of affreightment for 4075 tons, on condition that libelant waive the contract for 6200 tons.

(4) a threat that respondent will decline to load any cargo if libelant insists upon its contract for 6200 tons.

(5) a *present* implied declaration that respondent has already breached its contract by not forwarding the balance of 2125 tons necessary for the contemplated Cacique voyage under the contract.

6. *Libelant's letter of June 22nd* (Brief p. 7). Libelant admits, for the purpose of this appeal, that libelant did not, in this letter, state respondent's legal obligations correctly, and that, under the contract, it was only incumbent upon respondent to deliver the 6200 tons at San Francisco as fast as the vessel could load. On the other hand, libelant contends that it was under no obligation to load the vessel in June; that a loading in July satisfied this contract. Libelant's notice of June 22nd was merely evidence of a desire to meet, if possible, respondent's erroneous contention for the purpose of avoiding a conflict with respondent.

7. *The 1100 packages delivered by respondent on libelant's wharf.* After the Southern Pacific Com-

pany had deposited 1100 packages (about 1500 tons) on libelant's wharf Mr. Davis, agent for respondent, instructed the railroad company not to deliver (until advised to do so) "under any circumstances any of the cargo at present on hand booked Steamer Cacique" (304, 305).

The Southern Pacific Company thereupon advised libelant "that the delivery of that cargo to the Cacique had been held up, on instructions received" (318); that "some of this freight was delivered to the wharf after they received this notice" (319); that "this cargo then on the dock had been delivered by them by mistake, and they wanted it returned" (321). On the forenoon of June 27 the Southern Pacific Company advised counsel for libelant of the instructions received by respondent, sending at the same time the original letter of instructions.

Respondent states (Brief p. 7) that the 1500 packages were delivered "for shipment by the Cacique, and they were so received by libelant." While originally so delivered by respondent, it must be remembered that the delivery was qualified by respondent's insistence that they were Cacique freight only under the proposed 4075 contract and not under the contract in suit; that they were delivered simultaneously with a notice advising substantially: They *are* for shipment by the Cacique only if you accept the new, less favorable, contract which I propose. Libelant, on the other hand, did not receive them under the new, and less favorable contract proposed by respondent,

which it rejected, nor could libelant receive them under *this* contract, having been notified by respondent that this contract was repudiated.

8. Respondent, on page 9 of the Brief, emphasizes the fact that "no cargo was loaded, nor was attempt made to load any, until July 12th". While this is true, it will be proper, in this connection, to consider that the very controversy raised by respondent had the natural consequence of delaying the loading. It is not claimed by us that the whole cargo, had it been offered, could have been completely loaded in June; but loading might have commenced considerably before July 12th, but for the complications introduced by respondent's refusal to carry out its contract.

9. *The arrival of the Cacique in port.* Counsel calls our attention to an inadvertent statement relative to the hour of the Cacique's arrival in port, on June 27th. We accept the correction. The Cacique docked at her wharf at 7:30 a. m. and the libel was filed, and the goods attached, in the afternoon of the same day.

SECOND: REPLY TO APPELLEES' ANSWER TO THE STATEMENT THAT THERE WAS AN ACTUAL BREACH OF THE CONTRACT.

The principles governing the instant case are, we believe, correctly stated in *Anson on Contract* (3d American Edition by Corbin), page 445, as follows:

> "It is probable that in the United States there is *no difference* in legal effect between repudiation before the time set for performance and repudiation after that time. A *total* repudiation by A, i. e., an unconditional refusal by A to perform the acts required by his duty, always justifies B in refraining from going on with performance on his part; and this is true whether B has begun his performance or not. This means that B is discharged from his previous legal *duty* to perform; he is *privileged* not to perform. In both cases also B remains *privileged* to go on performing . * * * In like manner B's immediate *right* to damages does not depend upon whether A repudiates prior to the time set for his performance or afterwards. According to the overwhelming weight of authority, B has such an immediate right in either case."

Although respondent's agent had informed libelant, in his letter of June 24, *"that 4075 odd tons is the full cargo for the steamer Cacique, and that they recognize no contract binding upon them to forward 6200 tons on this vessel"* (109), respondent states (Brief p. 12) that "Respondent had in San Francisco on June 27th for shipment on the vessel Cacique not 4075, but 4650 tons." In this connection respondent's answer refers to "its shipment of 4075 tons" (39).

On page 13 of the Brief respondent criticizes "appellant's statement that the Southern Pacific * * * delivered a portion of the cargo to appellant". We refer to respondent's answer which "alleges that the said Southern Pacific Company, on the 23rd and 24th days of June, 1916, *delivered into the cus-*

tody of libelant, on Pier No. 26, approximately 1115 packages" (32).

Respondent states (Brief p. 13) that the notice to the Southern Pacific, on June 22nd, not to give any cargo to libelant, "was given before performance on respondent's part was due". This is a mistake; it was given *during* performance on respondent's part; for respondent started performance of the Cacique contract on May 1st (315).

Respondent criticizes our contention that the goods were stopped by respondent "in order to compel the making of a new contract". We think this contention is well supported by respondent's letter of June 14, advising libelant that 4075 tons is the entire cargo that would be forwarded; that if libelant wished to accept it on respondent's terms, it could do so; but if it insisted upon the 6200 tons, respondent would "decline to load any of the cargo whatever" (50).

We also think the statement "that libelant was notified not to touch respondent's cargo, or to prepare it for loading on the Cacique" is a justifiable inference from the notices given by the respondent to the Southern Pacific Company. In this connection Mr. Carter testified, on cross-examination:

> "Q. When you sent that wire did you know that there were 1100 tons of freight on the dock —1100 packages?
>
> A. It is quite probable, but we also knew that the Ford Motor Company had instructed the railroad not to deliver the automobiles, and the

> automobiles had been delivered by mistake by the railroad.
>
> Q. They were, none the less, there?
>
> A. Yes, they were there.
>
> Q. Ready, as you say in your libel, to be loaded on a ship?
>
> A. Yes, providing we were not prevented by the Ford Motor Company." (229)

Coming now to respondent's consideration of libelant's argument (Brief for Appellees, p. 14), counsel maintains that, to sustain our claim,

> "it was necessary for appellant to show that performance on respondent's part was due on June 27th, and that libelant was ready, able and willing to perform its obligations".

Appellant is prepared to accept counsel's challenge, and to show:

(a) that performance on respondent's part was due on June 27th, and

(b) that libelant was ready, able and willing to perform its obligations.

(a) Due performance on respondent's part, on June 27th, required that respondent should have ready 6200 tons of cargo—perhaps not actually at the port of San Francisco, but at any rate so near to the Cacique's wharf as to constitute cargo for her next impending voyage. It may be even admitted that respondent, by the demurrage clause, had bought the ship's time for a few days, and that a reasonable detention caused by waiting for some of the cargo would not have been a breach, by respondent, of the contract. But the facts show that re-

spondent had no 6200 tons available which could be made into Cacique cargo for this voyage, and that it had notified libelant that it never intended to provide 6200 tons for this voyage. Respondent had, before June 27th, repeatedly, and expressly, refused performance of that which was due to libelant, under its contract, on June 27th.

Counsel admits that

> "Respondent's obligation was to deliver alongside the steamer 'as fast as vessel can load' 6200 tons of automobiles in packages" (Brief p. 15),

and also admits

> "respondent's *apparent inability to deliver the full tonnage contracted for,* under the terms of the contract" (ibid.).

Surely counsel could not claim, in the face of the facts, that respondent, on June 27th, had fulfilled this admitted obligation to deliver 6200 tons of automobiles alongside the steamer 'as fast as vessel can load', knowing that respondent, by giving part of the Cacique cargo to cheaper vessels, had made it impossible to provide the agreed cargo for the Cacique.

(b) On June 27th libelant was ready, able and willing to perform its obligations. This point involves, in part, the construction of the contract which will be discussed more fully hereafter.

The District Court finds that

> "*libelant* was at all times willing and eager to carry out the contract, while respondent was not

> willing to furnish more than 4075 tons of the 6200 tons contracted for" (449),

and also finds that

> "On June 27th, however, the *Cacique* was not ready to take on cargo, and could not have been made ready to do so" (450) (meaning: ready to do so on June 27th).

The court, therefore, finds that *libelant* was ready, able and willing to perform its obligations on June 27th, but that the *Cacique* was not then ready to take on cargo. We contend that it is immaterial, under the contract, that the steamer was not ready to load on June 27th. Even the notice given by libelant to respondent, on June 22nd, that the vessel would arrive on June 27th, and that the delivery of the 6200 tons must commence on June 27, does not state, or intimate, that the Cacique would be ready to load on June 27th. Referring to the statement that delivery must be completed not later than June 29th, we admit that *this* was a requirement not justified by the contract, and that respondent was within its rights to claim that cargo delivered after July 1st was proper Cacique freight under the contract.

Counsel argues that respondent could in no event be in actual default until the 29th day of June had elapsed (Brief p. 16). But the facts clearly show that respondent *was in actual default* on June 27th; for, on that day, respondent had *not* 6200 tons ready for this Cacique voyage (by its own admission), having made it impossible to get them ready for this voyage.

Counsel assumes that "inability of the steamer to load," on June 27th, is equivalent to libelant's inability to perform the obligations of the contract. This assumption involves the construction of the contract, a question not involved in the decision of the District Court, although it is the heart of this controversy.

The filing of the libel was *not* "in advance of the time when performance was due on respondent's part and, therefore, in advance of an actual breach of the contract" (last paragraph, page 17 of the Brief). Performance was not merely the loading, nor merely the delivery of this cargo of 6200 tons; the performance due on defendant's part, on June 27th, was the duty to have 6200 tons of automobiles in such a position as to have them available for loading on the Cacique. Respondent cannot help admitting, and indeed does admit, its "apparent inability to deliver the full tonnage contracted for."

There was an *actual breach,* by respondent, on June 27th. It had previously made it impossible to perform and thereafter had notified libelant that it would not perform, and the actual breach *continued* down to the time of the filing of the libel. At that time respondent had not performed its obligation, due after arrival of the Cacique, to have 6200 tons available for her next voyage. Respondent admits that, "had there been an actual breach, the (1500) packages could have been so (in rem) attached" (Brief, p. 18).

On page 18 respondent states (for the purpose of producing some effect which we are unable to understand) that "the verified libel charges that these packages were delivered in part performance (11)." A reading of the libel proves that this is not true.

Respondent epitomizes its argument in the sentence: "The time for *performance or delivery* on respondent's part had not arrived, when the libel was filed" (Brief, p. 18). This shows the fallacy in the argument; for granting that the time for *delivery* on respondent's part had not arrived, the facts show that *performance* on respondent's part was commenced on May 1st, and that the time for making the shipment of 6200 tons ready was long overdue on June 27th.

THIRD: REPLY TO APPELLEE'S ANSWER TO THE ARGUMENT THAT RESPONDENT COMMITTED AN ANTICIPATORY BREACH.

The District Court decided this case on the ground, that, at the time the libel was filed, there was no actual breach of the contract by respondent, the libel having been filed prematurely, and that, if there was a previous anticipatory breach, it had then been waived by libelant's acceptance of a part performance under the contract.

This decision does not involve a consideration of the fundamental question, upon which this controversy turns, viz., the *construction of the contract* between the parties.

We are, therefore, justified in maintaining that this case was not disposed of upon its merits, but was decided on technical grounds. We respectfully submit that the principles underlying the decision should have no room in a court of admiralty in any case, least of all in a case which shows so deliberate and ruthless a disregard of contractual obligations as is disclosed by the facts of this case.

The reference, in our Brief, to counsel for respondent is criticized by the proctor on this appeal as "most unusual." The original proctors for respondent were Mr. Williamson, Messrs. McCutchen, Olney & Willard, and Messrs. Pillsbury, Madison & Sutro (17, 19, 57). The last mentioned firm withdrew from the case at an early stage, and the case was tried on behalf of respondent by the senior member of the firm which filed its withdrawal from the case in this court, while this appeal was pending. We trust that the reference to Mr. McCutchen in our Brief will be understood in the sense in which it was intended, viz. as an expression of the writer's admiration of his great ability. We do not admit that libelant's view of its proper remedies against the thirty carloads of automobiles delivered on its wharf was, under the circumstances, erroneous, the ship and the automobiles, a wrongdoing *res,* being then sufficiently connected for a proceeding *in rem;* but however that may be, and assuming that this court would not agree with us on this proposition, we contend that even a mistaken view of our remedies should not be permitted to defeat a

claim which is founded upon principles of equity and justice, and which grew out of respondent's greedy and callous disregard of the obligations of its contract. *If* an amendment of the libel were necessary at this stage, to conform with facts ascertained at the trial, it would aid substantial justice and would work no prejudice to respondent. Counsel is mistaken in making the statement that appellant had knowledge, when the libel was filed, of all the facts which were subsequently disclosed at the trial. The legal status of the 30 carloads of automobiles deposited on libelant's wharf was sufficiently anomalous to excuse a false step in enforcing libelant's remedy (*assuming,* without granting, that libeling them *in rem* was in law a false step). According to respondent's contention these automobiles were originally delivered into libelant's custody as cargo for the Cacique, on the 23d and 24th days of June, 1916 (32, 33). Afterwards, and after the Cacique had arrived, on the 27th of June, respondent finally stopped their delivery and attempted to withdraw them from libelant's custody. They could not be attached by process of foreign attachment (as were the remaining 150 carloads), because they were then in libelant's custody.

But granting, for the sake of argument, that process *in rem* against the 30 packages delivered into libelant's physical custody was the wrong remedy, it would not follow that libelant, by attaching them *in rem,* accepted them as a part performance of the contract. The proper deduction

would be the contrary conclusion, that libelant attached them *because* they, and their owner, were wrongdoers, having breached the contract. The new legal relation that had arisen between libelant on the one hand, and these goods and their owner on the other hand, was predicated upon the existence of a *breach* of the contract, which gave libelant a right of action against the goods or their owners, and not upon an assumption that the contract continued in force. When libelant attached the goods, it did so because the contract was breached, and in the enforcement of a remedy for the breach. In other words, the attachment of the goods was an unequivocal election to consider the contract breached.

Respondent charges that libelant, on June 26th, "deliberately stated its readiness and ability to perform the contract according to its terms" (Brief, page 24). This is true, and it is also true that libelant *was* ready and able to perform it according to its terms, as libelant understood them, and as we believe the court will construe them.

Respondent also claims that libelant then "stated that it *would* accept respondent's cargo as *part performance* of the contract, but not as a complete performance." But a reading of the letter demonstrates that libelant said no such thing. It said:

> "We do not accept such smaller quantity as a full *satisfaction* of the contract of February 25th, but as the *partial satisfaction* which it, in fact, is." (Brief, p. 25.)

The word "satisfaction" connotes the breach, and not the continued existence, of the contract. The situation was this: Respondent had given notice to libelant, on June 14th, that it did not recognize any contract for 6200 tons; that if libelant wished to accept 4075 tons as the entire cargo for the Cacique, it could do so; but if it relied upon a contract for 6200 tons and attempted to hold the 4075 tons as a remedy for the breach of the contract to deliver 6200 tons, respondent would not load any cargo whatever. Libelant's answer to this letter is entirely consistent with an understanding and election, by libelant, that the contract was *breached.* Its letter was an insistence upon all the secondary rights flowing from respondent's breach. It refused to accept the 4075 tons as a full satisfaction for the breach of the 6200 ton contract, and accepted the 4075 tons only as a partial satisfaction for the breach. This is made still clearer by the fact that, in an earlier part of the letter, libelant says, in effect, that it will take the 4075 tons offered, but will *"hold you responsible for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract."*

Respondent argues that this letter "definitely announced that no anticipatory breach would be accepted" (Brief, p. 25). In our opinion it announced, definitely, the exact opposite; it refers to respondent's breach of contract, claims damages therefor, and demands full satisfaction of its claim for damages. This could be considered a demand

for performance only in the sense that libelant, after breach by respondent, insisted upon the performance of its secondary rights, resulting from the breach. A contract between two parties always remains alive, after breach, until the injured party has enforced its secondary rights and received full satisfaction for his damages.

Respondent exaggerates the unseaworthiness of the Cacique when she arrived in port. He says: "The vessel was unseaworthy when she reached this port" (Brief, p. 25), which is true, and he then adds: "and at all times until July 12th" (Brief, p. 26), of which there is no proof. She did begin to load her outward cargo on July 12th; but the court may properly infer from the facts surrounding so serious a breach in the delivery of her cargo that some of the delay, after the breach, was due to the default of respondent. We contend, however, that a loading of the Cacique, even on July 12th, was within the terms of respondent's contract.

Respondent speaks of "appellant's change of front." We do not believe that this is intended to be a serious argument, as the correspondence, and all the facts, show so unfaltering a consistency on the part of appellant, that the District Court was bound to make the one favorable finding for libelant, that *"libelant was at all times willing and eager to carry out the contract"* (449). And is there anything in the record to show why in reason appellant should not have carried out this contract?

On page 27 of the Brief an argument begins which is predicated upon the fact that libelant did *not* load respondent's 1100 packages, then on libelant's wharf, *on June 30th.* Evidently respondent, while evolving this argument, had forgotten that the libel for breach of contract had been filed on June 27th. It is stated that "this course was taken in the hope that, by so doing, appellant would escape the effect of its own inability to load respondent's cargo, or any part of it, in the month of June." The fact is that appellant could have loaded some of the cargo (although not a substantial part) in June; but our contention is that, as a matter of law, it was not necessary to load any part of it in June; that any endeavors made by libelant to accomplish a loading in June were made for the purpose of avoiding a costly controversy with an unscrupulous contractant who had frequently indicated a disposition to cling to subterfuges in order to rid itself of a contract which had proved financially unprofitable after charter rates had come down.

Respondent charges that appellant's libel, filed some hours earlier than 9 p. m. of June 27th, was false in stating that libelant was then ready to perform its contract. This charge involves a construction of the contract. If libelant's construction is correct, the allegation is correct (see article IX of libel, apostles, p. 13, for the exact form of the allegation). Libelant's conduct, at and about the time of filing the libel, is absolutely consistent with libelant's contention that a July loading satisfies this contract.

Respondent professes to deduce "the intention and the understanding of the appellant to stand upon the contract as still in force" from a letter and a telegram of June 28th (Brief, p. 32). Evidently he has forgotten that, *on the previous day,* libelant had commenced this action for breach of contract and had thereby indicated, in an unequivocal way, its understanding that the contract was not in force, except as to the remedies for its breach. To support the argument, respondent cites the following question and answer, in Mr. Carter's cross-examination:

> "Q. And you intended to tell the Ford Motor Company in that letter that that contract was still in force as to the demurrage for $3000 a day, did you? A. Yes." (162)

Certainly the contract was in force *in so far as libelant still had the legal remedies for its breach.* If this were not so, the commencement of every legal action for a breach of a contract would be an admission of the continued life of the contract, and therefore, a waiver of the breach, and the injured party would, by the mere act of commencing the action, at the same time defeat his action.

It is argued (Brief, p. 34) that respondent's letters to the Southern Pacific Company

> "do not repudiate the contract or refuse to perform the same. Without referring to the contract at all, they merely *request* that deliveries be *delayed* until respondent directs them to be made."

The gist of the letter of June 22nd is: "do not, *under any circumstances,* deliver any of the cargo at present on hand" (262). At the same time respondent's agent notified libelant that "they recognize no contract binding upon them to forward 6200 tons on this vessel. Also that, *unless* the 4075 tons is *taken on this understanding,* and not subject to freight for 6200 tons, they request that *we withhold loading any of this cargo*" (109). If, therefore, the letter to the Southern Pacific Company was a "request that deliveries be delayed," the expressed intention was *to delay until libelant would submit* to the insolvent proposition to surrender its good contract in consideration of receiving a poorer substitute—a proposition which was immediately, and at all times, rejected by libelant. "Do not deliver until you are authorized to do so" means, therefore, in the light of the surrounding circumstances: "Do not deliver until libelant submits," or: "Do not deliver under *this* contract."

On page 36 of the Brief there is an attempt to show that the libeling of the packages *in rem* was not the enforcement of a remedy following a breach of the contract. The attempt is again predicated upon the assumption that, on June 27th, performance on the part of respondent "was not due." By what magic could respondent—presuming that it is subject to the laws of nature—be ready to load 6200 tons in the Cacique for her impending voyage, when it had only 4075 tons within reach and had deliberately refrained from providing, and re-

fused to provide, the remaining 2100 odd tons, and had, furthermore, offered these 4075 tons with the qualification: you take these under a new contract which I offer you, or you get nothing at all? In answer to the constant reiteration of the argument that the use of the words "partial *satisfaction*", by libelant, constitutes an *acceptance of a partial delivery* under the contract, we are again compelled to call attention to the obvious fact that a "satisfaction" can arise only *after* breach; that it comes into existence by and through a breach, and that, if one party to a contract says to the other: "I am willing to accept your offer as a partial satisfaction," he implies thereby his understanding that a *breach of the contract has been actually committed.*

On page 37 of the Brief respondent returns to the libeling *in rem* of the packages which had been delivered into libelant's possession as a part of the cargo which had been originally intended to be applied under the contract of February 25, 1916.

We will re-state our position on this phase of the case: These packages could not be reached under the process of foreign attachment, because they were not in the hands of a third party, but had been delivered into the custody of libelant. They were originally delivered by respondent as Cacique cargo. They were on libelant's wharf, on June 27th, and the Cacique was then lying alongside that wharf. Respondent had just signified its final determination to repudiate the contract, and had notified libelant that these packages were *not* to be considered as

cargo under the contract, but should only be used by libelant under another contract then proposed by respondent. At the same time the Southern Pacific had advised libelant that it had been instructed not to deliver any of the cargo under any circumstances. Under these circumstances libelant decided that the Cacique and the 1100 packages on her wharf had assumed such relations as to give rise to a mutuality of liens as recognized by the maritime law, and accordingly attached the 1100 packages *in rem.* We contend that libelant was justified by the facts in doing so, and that this attachment was not evidence of a recognition that the contract continued to live, but was just the opposite, viz.: Evidence of an election to seek a remedy for the breach of the contract.

Even if the relation between these 1100 packages, on the wharf, and the Cacique alongside, had not progressed to the stage where mutual liens had arisen, the packages had been delivered to the shipowner, and the latter had a right to retain them in mitigation of the damages for the breach of the contract by respondent. As was said by the Supreme Court, in the case of *4,885 Bags of Linseed,* 66 U. S. at 112:

> "Undoubtedly the shipowner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the ship-owner may enforce

> his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the shipment has parted from the possession, but is *analogous to the lien given by the common law to the carrier on land.*"

As has been shown by this court in the recent case of *The Saigon Maru,* 272 F. 799, the lien of the ship on the cargo for freight, and the lien of the cargo on the ship, are generally, but not always reciprocal. Just as a lien may arise against the vessel before the vessel would have a lien against the cargo, so also may a lien arise against the cargo before the cargo would have a lien against the vessel. Such a lien arose in the instant case, by the original delivery of the 1100 packages to libelant under the contract.

The 1100 packages could be attached *in rem* either as a wrong-doing *res,* which, although delivered to libelant under the contract as freight, threatened to withdraw as such; or they could be attached *in rem,* because libelant had acquired a *jus in re* against them for the payment, by their owner, of the freight lien.

From either point of view the attachment *in rem* was a correct proceeding; but from no sound point of view could it be interpreted as evidence that libelant was continuing a contract which it *knew* had been breached by respondent in fact.

The learned counsel for respondent affects (Brief, page 37) to understand our argument as an attempt

"to claim ignorance of the practice and the law applicable in cases of this impression." We have been misunderstood; we have not intended to make such a claim. We will say again that, in our opinion, the relation between the Cacique alongside her wharf and the 1100 packages delivered to her owners and deposited on the wharf was such as to give rise to a mutual lien for the performance of the contract which brought ship and cargo together.

At the same time, while disclaiming ignorance, we also disclaim infallibility. If the court should not agree with us, and should decide that, under the circumstances of this case, libelant held no lien on the 1100 packages for the damages resulting from respondent's breach of contract, we contend that the effect of such a decision would not be fatal to libelant's action. The attachment against these 30 carloads of automobiles would be annulled, but the process of foreign attachment sued out against the other 150 carloads in the custody of the Southern Pacific Company, and not yet delivered into libelant's custody, would leave this case properly within the jurisdiction of the court. Respondent could have had the attachment against the 30 carloads set aside; but the effect would not have been to dismiss the libel, or to disturb the jurisdiction.

The seizure by process *in rem* of these packages "indicates the understanding and the intention of appellant" that these packages were a wrongdoing *res;* that they had breached the contract, and that libelant accepted the breach as a breach.

On page 38 of the Brief counsel again refers to a "partial performance counted upon in the libel." We do not understand the reference, unless it should apply to the words "and ready for shipment thereon," in article VIII of the libel (13). From the alleged fact that the 1100 packages on the wharf of libelant were physically ready for shipment, it would not follow, however, that respondent intended them to be shipped at the time when the libel was filed: The contrary appears to be the fact. They were then a wrong-doing *res*. Nor would it follow that libelant, after receiving stop notices from both respondent and the Southern Pacific Company, was ready to ship them in performance of the contract. Certain it is that respondent did give notice to libelant, and to the Southern Pacific Company, "that such cargo was not to be used under the original contract" (Brief, p. 38).

Referring to the criticism, in the Brief, of *Tri-Bullion Smelting Company v. Jacobsen,* the statement is made: "The case did not involve an anticipatory breach" (Brief, p. 41). This is answered by the following citation from the case:

> "Viewed, however, as an *anticipatory breach,* the action of Jacobsen in writing the letter of July 8, 1913, *insisting that Tri-Bullion should carry out this contract,* did not, in any manner, cure such anticipatory breach of Tri-Bullion."

Counsel says (Brief, p. 43):

> "The correspondence set out in the record clearly shows that respondent was endeavoring *to secure sufficient cargo to meet the contract obligations.*"

The correspondence speaks for itself. "Sufficient cargo to meet the contract obligations" was 6200 tons. It is true that respondent, in its letter of June 1st, "*announced* that it had effected, as was thought to be the fact at that time, an arrangement to borrow the short tonnage from its shipments then in San Francisco for movement on the Union Steamship Company's steamers" (Brief, p. 44); but unfortunately for respondent the announcement itself which respondent so made was not true.

On pages 44-46 of the Brief respondent rehearses again "three circumstances" relied upon for the purpose of showing that appellant "did not accept the tendered renunciation:"

First. The letter of June 26. Our answer to this argument is: The language, "We stand strictly upon the contract made with you and insist upon your fulfillment of the same in every particular" referred to and rejected respondent's impertinent proposition that libelant accept 4075 tons in the place of 6200 tons contracted for. The statement that appellant declared "its willingness to accept the smaller quantity of automobiles offered by respondent in the letters referred to" (Brief, p. 45) is a flagrant misconstruction of the contents and purport of a letter which expressly holds respondent "responsible for all damages" sustained by the breach of the contract to supply the larger quantity.

Second. The attachment of the 1100 packages of respondent's cargo by process *in rem.*—We have shown that the seizure of these packages does *not*

evidence the understanding and intent of appellant that such packages were in its possession "as part performance", but that it does evidence the understanding of appellant that the owner of the packages, after having delivered them into libelant's possession, had breached the contract with libelant, and libelant's determination, consequent thereon, to resort to an effective remedy for the breach.

Third. The telegram of June 28th.—In the first place a telegram on June 28th could throw no light upon the question, whether the contract was alive on the previous day. In the second place, A's notice to B that he claims agreed damages against B for the latter's breach of contract is not a reliance upon the continued life of the contract. On the contrary, such a notice is predicated upon the contrary understanding, viz., that the primary obligations of the contract are dead by reason of B's breach, and that, as a result of this breach of the contract, A claims the secondary rights agreed upon in the contract.

The application of the rule cited by counsel from *Wells v. Hartford Manilla Co.,* on page 47 of his Brief, may be countenanced by appellant without apprehension; for it seems clear to us,

> *First.* That respondent's renunciation was so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question. Granting, for the sake of argument, that a mere threat to repudiate a contract some time

in the future is not such a renunciation as would entitle libelant to treat it as a breach, the facts show that respondent, in addition to announcing: "I will not load 6200 tons under any circumstances; I will load nothing, unless you accept 4075 tons," also exhibited plainly its present disability, and the impossibility of loading 6200 tons, both caused by its own act in the pursuit of its self-interest. The announcement referring to what it *would not do in the future,* coupled with the clear showing as to what it could not do in the present, constitute the renunciation and breach.

Second. Libelant thereupon treated the renunciation as a breach and sued for damages. The filing of the libel was conclusive evidence of its election to treat respondent's conduct as a breach. The respondent's final declaration, coupled with its obvious disability, were brought home to libelant just before it filed the libel. Even *if* libelant's acts, on June 25th and 26th, *had* constituted a waiver of respondent's breach (which is denied), the facts show that these acts were followed by a renewed breach, on June 27th, which was at once accepted as such by libelant.

A final word on the question, whether the facts in this case constitute an anticipatory, or an actual breach of contract by respondent: Respondent said in effect, on June 1st: "I recognize no binding obligation to supply 6200 tons," and on June 14th: "I

will load no cargo whatever, unless you accept 4075 tons instead of 6200 tons." This attitude was maintained down to June 27th. At the same time libelant was informed that respondent had no present ability to perform its contract, having in fact never made 6200 tons available for Cacique freight. These facts constitute a present breach of a future obligation, viz., the obligation to *load* 6200 tons in the Cacique for her impending voyage; but they also constitute a present breach of a present obligation, viz., the obligation to have then available 6200 tons for the Cacique voyage. It thus appears that the facts show both an actual, and an anticipatory breach of the contract by respondent. During the last few days before filing the libel the libelant could not, and did not, insist upon performance of the full contract; for libelant then knew that respondent, by its own acts, had made performance impossible. Its object was, to receive satisfaction for the breach. Its request for cargo was in performance of a secondary duty predicated upon the previous breach of the contract, viz., the duty to mitigate the damages caused to libelant by respondent's default.

FOURTH: REPLY TO APPELLEE'S ANSWER TO THE ARGUMENT ON "CONSTRUCTION OF THE CONTRACT".

The clause of the contract is: *"Shipment: Per American S. S. Cacique June loading."* (47)

The question is: What did the parties to this contract understand by the three words: *"Cacique June loading"?*

The question is *not,* as counsel represents, what is the meaning of the words: "June loading." To make such a representation plausible, respondent actually permitted, in the briefs filed in the District Court, a comma to creep between the word "Cacique" and the word "June".* This addition to the contract, which would be very helpful to respondent, is not attempted in the "Brief for Appellees" in this court; but respondent produces the same effect by the simpler device of detaching the words "June loading" from their context, claiming that "appellant's argument is directed to a discussion of the meaning of the contract words 'June loading,'" and that "proctor for appellant advances the theory that 'June loading', as used in this contract, means loading at some time other than June" (Brief, p. 47).

We protest against these imputations. It would be a foolish waste of time to advocate such a theory before this court. We have discussed the meaning of the concrete words of the contract: *"Shipment: Per American S. S. Cacique June loading"* and not that of the abstract words "June loading."

In passing we might say (what is quite obvious) that even if respondent's contention were accepted, viz., that "W. R. Grace & Company undertook to move respondent's cargo in June" (Brief, p. 47) this would not carry respondent far enough

*The clause is correctly printed on page 47 of the Apostles; but on page 93, by an error of the printer, the comma is inserted in the clause. It is important to note that the original contract contains no such comma.

to cancel the contract on account of libelant's failure to move the cargo in June, but would be merely instrumental in *giving respondent the right to claim damages (if it sustained any) by reason of such failure.*

Ignoring the rest of the clause from which the two words "June loading" are snatched, respondent devotes his whole argument to an endeavor to show what these two words mean in an abstract sense. The whole of this argument misses the point, and all abstract discussions of what a "June loading", in general, might mean, or what "the words June loading, singly and collectively" (Brief, p. 48), might mean, are immaterial. The question is, what did the words *"Cacique June loading"* mean, in this particular case, if we put ourselves in the position of the parties who signed the contract.

We have shown in our opening brief:

First. There is a practical presumption of law against such a construction of the words as would make them a condition precedent.

Second. That, without looking out of the four corners of the contract, it is apparent that the parties did not intend to fix an exact day or month for the shipping of the cargo; for (a) The express provisions are: that respondent *would be advised* later "when vessel is closer at hand", and that the time of *delivery* of the cargo "alongside steamer at San Francisco" was not to be definite, but should depend upon the readiness of the vessel to receive it.

(b) The *absence* of a cancelling clause (the usual method of making the arrival of the ship by a particular time a condition precedent to furnishing a cargo) has the effect of an *implied* provision that the arrival of the Cacique at any particular time should *not* be a condition precedent to furnishing a cargo.

Third. The circumstances surrounding the making of the contract, and also the practical construction of the parties, after the contract was made, show clearly and distinctly: (a) that the probable and expected loading of the ship was in June; and (b) that a loading in June was not contemplated as a condition precedent which should entitle respondent to cancel the contract.

While the words "June loading," in an abstract sense, "are in themselves clear and explicit" (Brief, p. 50), the construction of the words "Cacique June loading" requires the court to look out of the four corners of the contract. Counsel says that the words "June loading" mean "June sailing" (Brief, p. 51). It does not seem necessary to answer such a contention in this court.

In *Gray v. Moore,* 37 F. 266 (Brief, pages 51, 52), the ship's agent told defendants who had contracted to furnish freight to the ship, that the ship was leaving Genoa "in a few days," after October 25th, on which basis it was figured that she would arrive at the loading port "about November 20th." In fact *she did not sail in a few days,* but nearly four

weeks later, and the court found that the time of the vessel's arrival was based *"upon untrue representations,* which representations amounted to warranties on the part of the ship and her agents" (p. 268). Libelant was, of course, not allowed to recover against the defendant who had entered into the contract on the faith of the untrue representations. The instant case stands on a different basis; for it is not denied that, at the time of the making of the contract, the expected date of loading of the Cacique was figured out by libelant (as well as it could be done so far ahead) upon data which were *true* and not, as was done in the Gray case, upon data which the court found untrue.

Davison v. Von Lingen, 113 U. S. 40, is cited for the same purpose (Brief, p. 53), and we make the same obvious distinction. There was, in that case also, a warranty by the shipowner of the existence of a *present fact* (viz., that the ship was, at the making of the contract, in a particular situation). The existence of the alleged fact was not true, however, for she was in fact in a different situation.

These cases would only be relevant to the present discussion if libelant had misrepresented facts to respondent when the contract was made in February.

In *Norrington v. Wright,* 115 U. S. 188 (Brief, p. 54), "the plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February and 885 tons in March," and the Supreme Court held that "his failure to fulfill

the contract on his part * * * justified the defendants in rescinding the whole contract."

Respondent cited the three preceding cases not with any expectation that they could throw any light on the construction of the contract in the instant case. The whole argument begs the question; for it assumes what respondent is trying to prove, viz, that the parties to the instant contract agreed upon a cancelling date. But the whole contract implies and expresses the exact opposite, and respondent is enabled to make its assumption plausible only by picking the words "June loading" from their context. The real question, however, remains unanswered: What did these parties understand by a "shipment per American S. S. Cacique June loading"?

Our contention, that this contract provides prima facie that libelant should later advise respondent "more definitely as to exact loading late" (*day and month*), does not, as is claimed (Brief, p. 54), do violence to the contract as written, by practically expunging the two words "June loading", unless these words are wrenched from their context and construed as "guaranteed June loading." But this would do violence to the well-known canons of interpretation relative to conditions precedent. All provisions of the contract, and all canons of equitable construction, are preserved by construing the words "Cacique June loading" as meaning "Cacique expected June loading" rather than "Cacique guaranteed June loading."

There may be "nothing doubtful about the term June loading" (Brief, p. 55); but the court is certainly compelled to look into the circumstances to determine what the parties meant by "Cacique June loading."

On page 56 of the Brief respondent says:

> "They admit, though with some reluctance, that Mr. Davis was assured that the cargo would be loaded some time in June (122, 123)."

The reference is to the testimony of Harvey E. Moore, traffic manager for libelant. What he testifies is this, in substance:

> He told Mr. Davis that she (the Cacique) would be due in San Francisco for March loading for Vladivostok "and that *given a favorable voyage her probable date for returning for loading at San Francisco for these automobiles would be some time in June.*" Mr. Davis did not impress upon him that June shipment from San Francisco was necessary; they had been trying very hard to find space for this particular lot of freight, and they would very much appreciate anything which could be done by libelant to move it from San Francisco *within a reasonable time after it arrived here.* He did not tell Mr. Davis that the Cacique was certain to arrive in San Francisco during the month of June, *or at any particular time.* He told Mr. Davis at that time, *"it would be impossible* at any time, with the vessel's commitments ahead of her, *to guarantee that she would arrive here in June."* (122, 123, 124)

This also disposes of the statement that "libelant's officers knew that respondent wanted cargo space for May or June sailing" (Brief, p. 56), and

that "they wanted Davis to understand that he was getting 'June sailing', which was what he sought, or, at any rate, 'June loading' " (Brief, pages 56, 57). The statement that the information transmitted by Davis to respondent, viz., that Grace & Company could take the 6200 tons "for early June", was "undoubtedly obtained from libelant" (Brief, p. 57) is not supported by the evidence. Certain it is that Mr. Davis clearly understood, and so admitted, that a steamer of the tramp class, in the position of the Cacique, could not possibly, so long ahead, fix any exact time for a prospective shipment contemplated four or five months later (333, 334, 356, 357). It was entirely "reasonable for Grace & Company to draw the contract in its present form, if their undertaking was merely to load the cargo upon the return of the steamer Cacique from her voyage to Oriental parts" (Brief, p. 57), provided that it was reasonable for them to assume that they were dealing with a respectable contractant not expected to hunt for flimsy excuses for breaking its contract the moment the developments of the future would make a breach profitable. What was said in this case, is exactly what two fair business men would say, after having figured that the two probable loadings of the Cacique, after date, were expected to be, the first a March loading, the second a June loading; they would say that the agreed shipment should be per Cacique June loading, meaning thereby, not by the next loading after date, but by the second San Francisco loading after date. Respondent's argument

that such a form of expression is not reasonable would have much force if, after the experience which libelant has now had with the shifty Eastern rhetorician who wrote the letters of June 1st and June 14th, libelant should again rely upon the business language ordinarily prevalent among merchants presumably capable of standing by their contract, whether it "pays" or not.

Respondent argues that there is nothing ambiguous in the contract, and in the same breath admits that even now it has not made up its complicated mind as to whether the contract called for a "June sailing" or a "June loading."

On page 58 of the Brief respondent refers to "the testimony of Mr. Davis that he had asked Grace & Company for space for June sailing (326, 324, 328)." Of course it is thereby desired to create the inference that Davis had asked for a *guaranteed* June sailing. But his testimony in this respect shows just the opposite. He had secured space for previous months, which show that he did not intend to contract for space *earlier than June.*

> "We were looking over the map, and it seemed that the Cacique was about the only boat that we could *figure on* which would arrive for June sailing. As I recall, she was then on her way from the East Coast to this port, and then for Vladivostok, and her round trip would bring her back into this port ABOUT JUNE." (327)

If steamship men "figure" out that a vessel will arrive in port "about June," the probability in their minds is that she will not be *earlier* than June, but

they leave a margin in their minds for a possible later arrival. This evidently satisfied Mr. Davis' requirements.

> "I was told that it would sail *somewhere around the 24th of June,* or around the 14th or the 24th, I should say; but I don't remember exactly that conversation." (328)

Would this have satisfied Mr. Davis, if he had required a positive *guaranteed* June sailing? The evidence shows that Mr. Davis knew that no steamship-man would be in a position to guarantee the date of arrival of a steamer in the situation of the Cacique four or five months ahead (333, 334, 357).

The correspondence between respondent and its San Francisco agent, *after* the contract was made (Brief, p. 61), does not, in itself, determine the meaning of the words of the contract, but it shows what respondent, and the agent, understood by "Shipment per Cacique June loading."

If there is any doubt as to the true meaning of the contract, the practical construction put by respondent upon it, concurring with that of libelant, is entitled to great weight.

Railroad Co. v. Trimble, 77 U. S. 367.

The Supreme Court has said twice:

> "There is no surer way to find out what parties meant than to see what they have done."

Insurance Company v. Dutcher, 95 U. S. 269;

Lowery v. Hawaii, 206 U. S. 222.

In the latter case the Supreme Court added:

> "So obvious and potent a principle hardly needs the repetition it has received."

That a real doubt exists as to the true meaning of the contract is admitted by respondent's admission that even now it does not know whether the contract called for a June loading or a June sailing; but apart from this fact the question is, whether the contract requires a loading in June as a condition precedent, entitling the respondent to a cancellation in case of inability to load in June; or whether it means a loading in June as a warranty entitling respondent to damages, if it suffered any, by a loading in July; or whether it means, as libelant contends, a loading upon the second arrival of the Cacique in San Francisco, the exact date of which would be agreed upon later, but which, on February 25, 1916, was expected to be in June, as near as the parties could then figure out her probable arrival after her intervening voyages.

Counsel is in conflict with the record when he states (Brief, p. 61) "that both Davis and respondent treated the contract as one for June sailing." He is also mistaken in claiming "that shipments from respondent's factory were arranged by months." The correspondence shows the opposite: The words (used by respondent) *"say for late June early July sailing"* (269); and "would like this for *June-July sailing"* (270) and similar expressions in the correspondence ("about July 1"—314) show that the fixing of any precise time limit for loading

was not respondent's custom nor contemplated by respondent in this instance.

Respondent argues that the reference, by respondent's agent, to "S. S. Cacique, LOADING AT SAN FRANCISCO ABOUT JULY 1ST" (313, 314), *is not inconsistent with "June loading"* (Brief, p. 62). We heartily agree with this argument; it is exactly what we are contending. The "June loading" in this contract, the "Cacique June loading," *is* satisfied by a "loading at San Francisco *about July 1st."* Here we have, after a long struggle which has necessitated all this argument on our part, a definite and conclusive admission that a loading of the Cacique *"about July 1st"* is a fulfillment of the contract within the meaning of the parties; that a loading in June is *not* a condition precedent, but that a loading in July is within its terms.

On page 62 respondent argues that:

> "the letter of May 31st referring to the willingness of the Union Steamship Company to release any of respondent's freight remaining after July 1st, for the purpose of enabling respondent to fill its undertakings under the present contract, are the statements of the Union Steamship Company, not of respondent."

This is not so. They are the statements of respondent's agent, made to respondent, suggesting the securing of *freight available after July 1st* as a *proper fulfilment of respondent's undertakings.* The suggestion came from the man who signed the contract and was made to his principal. What better evidence could there be to show that this party

to the contract construed the contract to mean that a providing of Cacique freight, by respondent, after July 1st, was a proper compliance with the terms of the contract?

That respondent had the same understanding is shown by its letter to the San Francisco agent referring to the invoices and bills of lading covering the Australian shipments for June and July. In this letter respondent states that the *June* shipments are expected to go forward on the Union Steamship Company's steamers (Coolgardie, June 3d, and Waimarino, June 30th), *whereas the July* shipment was expected by respondent ("we expect") to go forward in the Cacique ("Cacique *July 12th*") (309).

Exactly in line with this expectation, by respondent, is the "hope" expressed by Mr. Davis that the vessel "will even be as late as the tenth of July." They both show that respondent *did not want a June loading;* for it would have involved a heavy demurrage bill. Counsel argues that Mr. Davis' hope was "that some solution of its (respondent's) difficulties might appear "if the steamer did not arrive in time to make 'June loading' " (Brief, p. 63). If this had been all that occupied Mr. Davis' and respondent's mind, would it not have been sufficient that the Cacique would be as late as the first of July? Would Mr. Davis have expressed first, "the hope that she will *even* be as late as the tenth of July," and, second, the hope born from the first one, viz., the "hope that you will be able to fill the space with your own cars"? (308, 309).

The court will note that, while an explanation of Mr. Davis' hope of June 13th is attempted in the Brief for Appellees, respondent has not had the hardihood to offer an explanation of respondent's expectation of June 3rd that the cargo would go forward on the Cacique on July 12th.

The evidence shows that Mr. Davis never had it in his mind, on February 25, 1916, that the contract which he was making should be automatically cancelled in case the Cacique should not be loaded by June 30th. At that time cargo space was so precious that respondent was willing to pay for space as high as $52.50 per ton (265, 267); respondent, therefore, knew that it was *then* making an advantageous bargain. Vessel tonnage was very scarce, on account of the European War (118), and respondent was in need of a vast amount of tonnage. It would not have been the interest of respondent, under these circumstances, to make a contract providing that respondent should automatically lose this ship if she should happen to arrive on the first of July instead of the last of June. And it would have been incredible folly for libelant to tie up its steamer in a contract, for less than the going rate (117), with a provision that she would find 6200 tons of cargo ready for her voyage, if she arrived on the last day of June, but that the contract should be "automatically cancelled" (299), and she would find no cargo at all, if she arrived on the first day of July. A little reflection will show how fatal the effect of such a contract would have been even to respondent's interests.

Supposing it had really wanted space for June only and insisted that an arrival in July should cancel the contract automatically, this would have invited libelant to make a more favorable contract with another party after February 25th and, after that was done successfully, to delay the steamer one day, to July 1st, so as to "cancel the contract automatically." Respondent is too shrewd a merchant to allow the presumption that it would have been capable of making such a contract as it now, in the light of the after events, pretends to have made. The court will assume that the parties to this action were both possessed of normal business ability, and on such an assumption the construction for which respondent contends becomes impossible.

That this contract contains no condition precedent, nor warranty of the time of loading, follows first, from the natural construction of the contract as a whole; second, from the evidence of the circumstances surrounding the parties when they made it; and third, for the practical construction which the respondent placed upon it subsequent to its making, as appears from the correspondence in evidence. All of these facts, viz., the natural construction of the language, the circumstances at the time, and the acts of respondent subsequent to the time of the making of the contract, point to the same conclusion: that respondent's expedient of snatching two words "June loading" from their context can be of no avail in establishing a defense on the merits.

We contend that even a strictly literal construction of the *whole* contract favors the meaning for which libelant contends, viz., that the time of the loading was a condition precedent only in the sense that the Cacique was to load respondent's cargo on her *second* arrival at San Francisco after the date of the contract.

Even if that were not so and the words "June loading" were detached from the context, this court would follow the principles laid down by the Supreme Court in *Reed v. Insurance Company,* supra, to the effect that

> "a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties" (95 U. S. 30),

and would find that "all the circumstances of the case" make it manifest that the parties in this case used the words in question in the sense for which we contend.

> "Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written." (95 U. S. 30.)

The Supreme Court, in the case cited, adopted the language from *Taylor, Evid.,* sec. 1085:

> "It may and, indeed, it often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it." (95 U. S. 31.)

In the instant case

> "no violence is done to the language used, to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties." (95 U. S. 32.)

FIFTH: REPLY TO APPELLEES' BRIEF (pages 64-69,

Respondent's argument is predicated upon the assumption that respondent's performance of the contract was not due until the Cacique was ready to load at her loading wharf. But, as we have shown, its performance of the contract was due long before and respondent, realizing this, had commenced performance long before by sending some of the Cacique cargo westward. Respondent had breached its contract on the day when the libel was filed in numerous ways, the principal and sufficient one being its failure and definite refusal to supply 6200 tons of cargo for the impending Cacique voyage. In one sense respondent's breach was anticipatory, be-

cause it had not yet performed *all* the acts constituting performance on its part; in another sense it was a breach during performance, performance having been begun by respondent in May. Libelant's action was not commenced before performance was due on the part of respondent, but on the contrary, was commenced *after* respondent had breached its duty, by failure and refusal, to provide 6200 tons of cargo.

We believe respondent to be mistaken in claiming that, under the *"Indrapura"* doctrine (Brief, p. 65) "libelant would have had no right to load respondent's cargo and take the vessel into dry dock." We suggest that libelant had the right to so load the cargo, subject to respondent's right to damages in the event that any injury had occurred to the cargo during the dry docking.

Respondent emphasizes its contention that, when the libel was filed, "time for *loading* had not arrived" (Brief, p. 65). If that be granted, it does not follow that respondent's time for performing had not arrived. It *had* arrived long ago, and respondent recognized this by beginning performance in May; it had not only arrived, but respondent, after commencing performance, changed its mind and failed and refused to continue.

Respondent also predicates an argument upon the assumption of *"exact loading dates."* The answer is, that there are no exact loading dates under this contract. On the contrary, respondent was given (within reasonable limits) the right to buy the

time of the vessel, at so much per day, for the purpose of loading at *its* convenience. Even if libelant did ask for a loading on June 29th, this did not excuse respondent's failure and refusal on June 27th, to carry out the 6200 tons contract.

Respondent's reference to a "stipulation" made, at the trial, by counsel for libelant is obviously overdrawn (Brief, p. 66). There was no admission of *fact* involved in the colloquy which took place between the court and libelant's counsel, at the closing argument of the case, and which is referred to in Brief for Appellant, page 71; it could, therefore, not be properly characterized as "the most solemn form of evidence that can be produced." In a trial de novo it is proper that counsel may, if he so desires, claim the benefit of legal principles, or a theory, which he may have waived at the first trial. It is not, however, admitted that the benefit of this principle is *required* for the purpose of a proper decision of this case. We do not ask for any "withdrawal of evidence" (Brief, p. 67). All that we contend is that the libel, even if it were brought a few hours too soon, should not be dismissed for that reason alone.

> "A libel will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it."
>
> *The Hyperion's Cargo,* Fed. Cas. No. 6,987.

> "It would be in the power of the court, by giving costs or otherwise, to give to the claimant a complete indemnity for all the loss or inconvenience he can sustain by the premature

commencement of the suit. And it would not have been necessary to dismiss the libel. * * * *It is not the practice of courts of admiralty to favor formal or technical objections,* to the sacrifice of substantial justice.

The Salem's Cargo, Fed. Cas. No. 12,248.

"In courts proceeding according to the course of the civil law *there is less reason for rigor in the rule that the right of action must be complete when the suit is commenced than in common law courts.* * * * If the cause of action is matured when the answer comes in, or even at the time of trial, there is no necessity for ordering the suit to be brought de novo. * * *"

The Isaac Newton, Fed. Cas. No. 7,089.

To the same effect is

Furniss v. The Magoon, Fed. Cas. No. 5,163.

From these authorities it follows that, even if it were true that libelant "had no case at all when the libel was filed" (which is denied), this would not be a cause for dismissing the libel.

We submit that, on the merits of this case, and in the interest of justice, the decree of the District Court should be reversed.

Dated, San Francisco,
November 10, 1921.

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